No. 84-38



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

PEOPLE OF THE STATE OF ILLINOIS and
PEOPLE OF THE STATE OF MICHIGAN,
*Petitioners,*

vs.

CITY OF MILWAUKEE, et al.,
*Respondents.*

PEOPLE OF THE STATE OF ILLINOIS and the
METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,
*Petitioners,*

vs.

THE SANITARY DISTRICT OF HAMMOND, et al.,
*Respondents.*

On Petition For Writ Of Certiorari To The
United States Court of Appeals For The Seventh Circuit

## BRIEF OF THE STATES OF TENNESSEE AND OKLAHOMA AS AMICI CURIAE

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On Petition For Writ Of Certiorari To The
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## BRIEF OF THE STATES OF TENNESSEE AND OKLAHOMA AS AMICI CURIAE

### THE INTEREST OF THE AMICI CURIAE

The *amici curiae* are the sovereign states of Tennessee and Oklahoma, which file this brief by and through their respective Attorneys General pursuant to Rule 36.4 of the Rules of the Supreme Court. Each of the *amici* states, in the exercise of their reserved police power, have enacted legislation respecting the

protection of the environment for the furtherance of the public health, safety, and welfare.[1]

The Court of Appeals, by holding in *Illinois v. City of Milwaukee,* 731 F.2d 403 (7th Cir. 1984) ("*City of Milwaukee*"), that the Federal Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), preemptes the application of state law to out-of-state sources of pollution, has raided the treasury of power reserved to the states.[2] If upheld, this decision could strike a devastating blow to the ability of the *amici* states to exercise their inherent police power to protect the water resources and health, safety, and welfare of the people of their states. At least two ongoing efforts of the *amici* states would be directly affected by this Court's decision to reverse or uphold the Court of Appeals.

First, Tennessee, which is bounded by eight other states and traversed by scores of interstate rivers and streams, has found it necessary to bring suit under Tennessee law in the Tennessee

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[1] Particularly pertinent are those laws by which the *amici* states seek to protect, preserve, and enhance the quality of their waters. *See, e.g.*, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 *et seq.* As stated in T.C.A. § 69-3-102(a):

> [I]t is declared to be the public policy of Tennessee that the people of Tennessee . . . have a right to unpolluted waters. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.

Further, pursuant to T.C.A. § 69-3-114(a), causing pollution is declared to be a public nuisance, subjecting the violator to actions for civil penalties, T.C.A. § 69-3-115(a), injunctive relief, T.C.A. § 69-3-117, and, in appropriate cases, criminal sanctions and fines. T.C.A. § 69-3-115(b) & (c).

[2] U.S. Const. amend. X.

state courts against an out-of-state polluter of its waters.[3] That suit involves the gross and continuing pollution of the Pigeon River, an interstate stream flowing from North Carolina into Tennessee, by the defendant owner and operator of a papermill located a short distance across the Tennessee-North Carolina border. The defendant's effluent has turned the Tennessee portion of the Pigeon River into a murky, odorous stream which supports only minimal aquatic life. Ironically, the Pigeon River is a premier trout and bass stream in North Carolina above the defendant's papermill. The Tennessee Chancery Court initially ruled that the CWA has *not* preempted the application of state law to interstate pollution problems.[4] Following the Court of Appeals' recent decision in *City of Milwaukee*, the Tennessee Chancery Court declined to follow the Court of Appeals' decision.[5]

The State of Oklahoma's interest in this lawsuit results from its attempts to protect the Illinois River, one of the few free-flowing, statutorily-designated[6] scenic rivers in the State of Oklahoma, from pollution from a neighboring state. The Illinois River is an interstate river which flows from Arkansas into Oklahoma before returning to Arkansas. Several municipalities in Arkansas discharge pollution into the Illinois River with the result that the river is slowly dying from eutrophication. Oklahoma has unsuccessfully attempted to prevent the death of this river by seeking to file suit before this Court against the

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[3] *State of Tennessee v. Champion International Corp.*, No. 83-1149-I (Tenn.Ch.Ct., filed July 8, 1983) ("*Champion*").

[4] *See* Memorandum Decision, Appendix, A-1.

[5] *See* Memorandum Decision, Appendix, A-4. The defendant's application for an interlocutory appeal by permission is pending before the Tennessee Court of Appeals.

[6] Oklahoma Scenic Rivers Act, Okla. Stat. tit. 82, § 1451 *et seq.*

State of Arkansas and other alleged contributors to the pollution.[7] Further, the City of Fayetteville, Arkansas is currently proposing to build a new sewage treatment facility which will discharge into the Illinois River, thus contributing to the further degradation of the river. The *Pigeon* and *Illinois Rivers* cases are excellent illustrations of the scenario painted by the Petitioners before this Court in which "the States will continue to seek redress of their quasi-sovereign ecological rights...either through original proceedings in this Court...or in their own state courts, which may not be 'persuaded' by the 'logic' of any lower federal courts whose opinions they are not bound to follow."[8]

## SUMMARY OF ARGUMENT

The *amici* argue that: (1) Prior to *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972) ("*Milwaukee I*"), and the federal common law which was thereby created, there was no bar to the application of state law to control interstate water pollution and this Court in *Milwaukee I* did *not* irreversibly erase this inherent state power but merely superseded it; (2) This Court in *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304 (1981) ("*Milwaukee II*"), found that the CWA preempted federal common law but did *not* decide that state law was similarly preempted; (3) Upon the demise of federal common law pursuant to *Milwaukee II,* the disability previously imposed by the federal common law upon the inherent state police power dissipated, unless the CWA itself preempts state law; (4) There is no indication in the CWA that Congress intended to preempt state law; indeed, the CWA expressly preserves such state law.

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[7] *Oklahoma v. Arkansas,* No. 83, Original (Oct. Term, 1982). This Court declined to invoke its jurisdiction in that case. *Id.*, (Order filed March 3, 1983).

[8] Petition of Illinois & Michigan 13.

The Court of Appeals in *City of Milwaukee* erroneously held that Congress, in passing the 1972 CWA Amendments, intended that state laws as well as federal common law be preempted in the context of interstate water pollution. By incorrectly deciding a question of federal law, the Court of Appeals has seriously impeded the ability of the *amici* states to prevent the destruction and deterioration of their waters caused by sources outside their boundaries. This decision has such a severe impact on the ability of the *amici* states to protect their water resources and the health, safety, and welfare of their citizens that it presents an issue which should be decided by this Court.

## ARGUMENT

**This Court Needs To Correct An Erroneous Ruling Of The Seventh Circuit Court Of Appeals Which Seriously Affects The Ability, Right, And Duty Of The *Amici* States To Regulate The Pollution Of Their Waters From Out-Of-State Sources And Thus Protect The Health, Safety, And Welfare Of Their Citizens.**

The Court of Appeals has erroneously held that "the logic of *Milwaukee I* and *Milwaukee II*" and the 1972 CWA Amendments preclude the application of one state's law to prevent the pollution of its waters from a discharge of pollutants originating in another state. 731 F.2d at 414. The authorities relied upon by the Court of Appeals do not mandate such an outcome but, instead, indicate the opposite result.

It is clear that, prior to *Milwaukee I,* state law of the state within which the pollution caused harm controlled the interstate pollution of boundary waters. *Ohio v. Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971)[9]. That this inherent state police power was not irreversibly displaced by the creation of federal common law in *Milwaukee I* is a settled constitutional principle illustrated as long ago as *Sturges v. Crowinshield,* 4 Wheat (17 U.S.) 122 (1819).[10]

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[9] In creating federal common law in this area, *Milwaukee I* by necessity overruled *Wyandotte. See* 451 U.S. at 327 & n. 3. *See also Milwaukee II,* 451 U.S. at 327 n. 19. *Wyandotte,* however, demonstrates that the states have the inherent power to prevent pollution of their waters, whether of intra or interstate origin, absent preemptive federal law.

[10] Mr. Chief Justice Marshall rejected the argument that the enactment of a national bankruptcy law which preempted state bankruptcy laws thereby permanently extinguished the power of the states in that field, even after the repeal of the federal statute. *Id.* at 196. *See also Chicago & N.W.R.R. Co. v. Fuller,* 84 U.S. 560, 568 (1873).

With the demise of the federal common law in the wake of *Milwaukee II*, the relevant inquiry has become whether Congress, in enacting the 1972 CWA Amendments, intended to preempt *state* law. The misplaced focus of the Court of Appeals' decision in *City of Milwaukee* is revealed by the Court's conclusion that "[t]he very reasons the [Supreme] Court gave for resorting to federal common law in *Milwaukee I* are the same reasons why the state claiming injury cannot apply its own state law to out-of-state discharges now." 731 F.2d at 410. However, this Court in *Milwaukee II*, 451 U.S. at 316, clearly stated:

> Contrary to the suggestions of respondents, the appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is *not the same* as that employed in deciding if federal law pre-empts *state* law. In considering the latter question 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'. (Emphasis added).

The *amici* fail to discern any "clear and manifest" intent of Congress in the CWA to preempt state laws.[11]

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[11] Where Congress intends to preempt state law, it usually says so in affirmative, clear, and explicit terms. *See, e.g.*, 7 U.S.C. § 228c (Federal Packers & Stockyards Act); 15 U.S.C. § 755(b) (Emergency Petroleum Allocation Act of 1973); 15 U.S.C. § 2617 (Toxic Substances Control Act); 17 U.S.C. § 301 (Federal Copyright Act). And, where Congress has not clearly stated that state law is preempted, state law is preserved "unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States". *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

The text of the CWA shows, instead, the Congressional purpose to *preserve* rather than to preempt state law remedies for interstate water pollution. In CWA § 101(b), 33 U.S.C. § 1251(b), Congress expressed its intent "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ." Toward this end, CWA § 510(1), 33 U.S.C. § 1370(1), states that nothing in the CWA procludes or denies the rights of *any* state to adopt or enforce not only "(A) *any standard or limitation* respecting discharges of pollutants", but *also* "(B) *any requirement* respecting control or abatement of pollution. . . ." (Emphasis added). In addition, CWA § 510(2) states that the CWA shall *not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."* (Emphasis added). The plain language of § 510 simply refutes the Court of Appeals' view, 731 F.2d at 413, that § 510 applies only "to save the right and jurisdiction of a state to regulate activity occurring within the confines of its boundary waters".

The Court of Appeals likewise held that CWA § 505(e), 33 U.S.C. § 1365(e), which provides that nothing in § 505 restricts *any* right or relief under *any* statute or common law, preserves only "a statute or the common law of the state in which the discharge occurs." 731 F.2d at 414. As the Petitioners note, Petition 28 n. 9, the Court's construction of § 505(e) and § 510 seems to have its foundation more in a skewered policy judgment than in the plain meaning of the CWA.

Contrary to the Court of Appeals' suggestion that the CWA § 402, 33 U.S.C. § 1342, permitting process "seems now to be the appropriate federal forum for adjusting the competing claims of states in the environmental quality of interstate waters," 731 F.2d at 412 n. 5, the mere *availability* of the § 402 administrative process is no indication that Congress intended to *displace* any other jurisdiction or remedy of the states. The process provided by § 402 for an affected state to challenge the issuance of an

NPDES permit by the issuing state is exceedingly cumbersome and simply does not provide an adequate remedy for the amelioration of interstate water pollution.[12] Indeed, it is at best unclear whether a refusal by the Environmental Protection Agency to veto an issuing state's NPDES permit can be challenged in any federal court by the affected state,[13] leaving those harmed in the affected state completely to the unfettered mercy of state and federal administrative authorities.

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[12] The Court of Appeals criticized Illinois' failure to participate in the permitting process when the Milwaukee permits were issued. 731 F.2d at 412 n. 5. Tennessee, conversely, was never given either notice of or the opportunity to participate in the permitting process for the current NPDES Permit of the discharger in the *Champion* litigation. *See* Appendix at A-6. In addition, as the Tennessee Chancery Court noted, *id.*, the defendant's NPDES application had been pending for over two years before North Carolina regulatory authorities when the *Champion* suit was filed; as of the filing of this brief, this application has been pending for over three years. Meanwhile, the noxious Pigeon River continues to flow across the border into Tennessee, its pollution unabated.

[13] The Court of Appeals noted this uncertainty in *Illinois v. City of Milwaukee,* 599 F.2d 151, 160 & n. 17 & 18 (7th Cir. 1979). This Court has not decided the issue, merely stating in *Crown Simpson Pulp Co. v. Costle,* 445 U.S. 193, 197 n. 9 (1980)(emphasis added), that such a failure to veto would "*not necessarily*" constitute reviewable EPA action. Several cases have held there to be no review available in either the Courts of Appeal, *District of Columbia v. Schramm,* 631 F.2d 854, 861 (D.C. Cir. 1980); *Save the Bay, Inc. v. EPA,* 556 F.2d 1282, 1290-91 (5th Cir. 1977); *Mianus River Preservation Comm. v. EPA,* 541 F.2d 899, 909 & n. 24 (2nd Cir. 1976), or in the Federal District Courts. *Schramm, supra,* 631 F.2d at 860; *Hanks v. Costle,* 501 F.Supp. 195, 200 n. 15 (E.D. Va. 1980); *Chesapeake Bay Foundation, Inc. v. U.S.,* 445 F.Supp. 1349, 1353 (E.D. Va. 1978). *But see Save the Bay, Inc., supra,* 556 F.2d at 1292-96 (District Court review available only to determine whether EPA has considered alleged violations of *federal* standards or has based decision on statutorily irrelevant grounds). Of the above cases, interstate pollution was involved only in *Schramm, supra.*

## CONCLUSION

The *amici* respectfully request that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

IN THE CHANCERY COURT FOR THE
STATE OF TENNESSEE
7th DIVISION
DAVIDSON COUNTY PART ONE

No. 83-1149-I

State of Tennessee, James E. Word, Commissioner,
Tennessee Department of Health and Environment;
and the Tennessee Wildlife Resources Agency

vs.

Champion International Corporation, Inc.,
d/b/a Champion Papers

### MEMORANDUM

This action is before the Court on defendant's motion to dismiss plaintiff's complaint. For reasons hereinafter stated, the motion is denied.

This action arises out of plaintiffs' complaint against the defendant, Champion International Corporation, Inc., d/b/a Champion Papers (Champion) of Canton, North Carolina. Champion is engaged in the manufacturing of paper and paper products at its Canton, North Carolina facility. In its manufacturing activities, Champion draws water from the Pigeon River for its use and subsequently discharges the water back into the Pigeon River. The plaintiffs allege that Champion's waste water treatment process is not adequate to protect the Tennessee waters of the Pigeon River from pollution pursuant to Tennessee's water quality standards, and further that Champion violates North Carolina water quality standards for "Class C" rivers. The Pigeon River originates in the state of North Carolina and thereafter enters the State of Tennessee in Cocke County, Tennessee, near the town of Waterville, North

Carolina. After entering the State of Tennessee, the Pigeon River flows for approximately 26 miles and through the city of Newport, Tennessee before its confluence with the French Broad River and Douglas Reservoir. Plaintiffs contend that Champion discharges effluents into the Pigeon River at its North Carolina facility, which causes pollution to exist in the Tennessee waters of the Pigeon River.

The defendant has based its motion to dismiss upon two grounds: first, this Court lacks jurisdiction over the subject matter and second, plaintiffs' complaint fails to state a claim upon which relief can be granted.

The threshhold issue presented to the Court is whether federal law as contained in the Clean Water Act, 33 U.S.C. § 1251, *et seq.* is the exclusive remedy in matters involving interstate pollution. The defendant, relying on *Illinois v. City of Milwaukee,* 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972) (Milwaukee I), *City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (Milwaukee II) and, the Clean Water Act, 33 U.S.C. 1251, *et seq.*, strenuously urges that no state has ever had the power to govern interstate pollution originating in another state, and further that the replacement of federal common law by the Clean Water Act leaves the Clean Water Act as the exclusive remedy for abatement of interstate water pollution. The plaintiffs take the opposite position and strenuously urge that the Clean Water Act, 33 U.S.C. § 1251, *et seq.*, does not preempt the power of the State of Tennessee under the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101, *et seq.*, to regulate private industries outside of Tennessee that pollute navigable waters flowing into Tennessee.

After an analysis of the Milwaukee I and Milwaukee II cases, the Court agrees with the plaintiff that these cases do not address the issue of the Clean Water Act's, *supra,* preemption of state law actions against non-resident polluters in state courts,

but instead they address the preemption of federal common law actions by the Clean Water Act, *supra,* in the federal courts. Therefore, in this respect, defendant's reliance is misplaced.

An ordinary and reasonable reading of the Clean Water Act, *supra,* persuades this Court to conclude that this Act does not preempt the State of Tennessee from bringing the instant cause of action under the Tennessee Water Quality Act of 1977, T.C.A. § 69-3-101, *et seq.*, and the nuisance laws of this state.

Accordingly, this Court is of the opinion and finds that it has jurisdiction of the subject matter of this cause of action, and the complaint states a claim upon which relief can be granted. Therefore, defendant's motion to dismiss is denied.

/s/ Irvin H. Kilcrease, Jr.
Chancellor

February 21, 1984

cc: Charles H. Warfield
Frank J. Scanlon

## APPENDIX B

IN THE CHANCERY COURT FOR THE
STATE OF TENNESSEE
7th DIVISION
DAVIDSON COUNTY PART ONE

No. 83-1149-I

State of Tennessee, James E. Word, Commissioner,
Tennessee Department Of Health And Environment,
and The Tennessee Wildlife Resources Agency

vs.

Champion International Corporation,
d/b/a Champion Papers

### MEMORANDUM

This case is before the Court on defendant's motion for a new trial or, in the alternative, to alter or amend the order entered March 7, 1984. The Court will treat the motion as a motion to alter or amend judgment, T.R.C.P. 59.03. As grounds for its motion, defendant has presented to the Court for review a copy of the recent decision of the United States Court of Appeals for the Seventh Circuit in *Milwaukee II*. This decision was rendered after this Court overruled defendant's motion to dismiss on March 7, 1984. This Court has reviewed the opinion of the Seventh Circuit and has decided to deny defendant's motion to alter or amend.

First, the Court respectfully differs with the Seventh Circuit on the question of whether Congress, through the Clean Water Act, 33 U.S.C. § 1251, intended to preempt state law. The purpose of the Clean Water Act was to create an additional remedy to the urgent national problem of water pollution, not to destroy those remedies already in existence. Section 1370 of the Clean Water Act, in particular, indicates to this Court the Con-

gressional intent to preserve existing state remedies in cases of both intra-state and inter-state water pollution.

Second, this case is different from *Milwaukee II* in an important respect: defendant is not a governmental entity. Although the Seventh Circuit stated that

> [i]t is clear...that the federal nature of the problem, and the basic interests of federalism do not depend on the case being a state versus state case. *It may well be significant, however, that...these are attempts by a state to regulate municipalities of another state* in discharge of their public responsibilities. (emphasis added)

This Court finds the character of the parties to be particularly significant in light of the alleged violations of the nuisance laws of this state. As the Seventh Circuit recognized, in an ordinary interstate tort, principles of federalism do not preclude the application of one state's law to determine liability and provide a remedy for acts done in another state and producing injury within the forum state. *See Milwaukee II*, Seventh Cirt. (1984) p. 17, footnote 3. Although the Seventh Circuit determined that this doctrine is not applicable to cases of water pollution by governmental entities into interstate bodies of water, this case does not involve a governmental entity; it involves an individual, and is similar to an ordinary nuisance case.

Third, the facts of this case as constituted in the record presently before the Court contain persuasive reasons why state law should not be preempted by the federal Act. The Act is not directly administered by the federal government. Tennessee has had to rely on the North Carolina administrator to enforce the provisions of the Act. Although the Clean Water Act was made effective in 1972, defendant obtained its permit in 1977, five years later. This permit expired on December 31, 1979. Defendant applied for a second permit in May, 1979 and received a renewal permit on June 19, 1981, two years later. This permit was effective for only eleven days, expiring on June 30, 1981.

Defendant has been operating without a current permit since June 30, 1981. Defendant's application for a permit had been pending for over two years at the time this lawsuit was filed. The record reflects that the State of Tennessee was never given notice of or an opportunity to participate in public hearings on the permits which expired in 1979 or 1981.

The motion to alter or amend will be denied. The attorneys for the State will prepare the order.

/s/ Irvin H. Kilcrease, Jr.
Chancellor

June 1, 1984

cc: Charles H. Warfield
Frank J. Scanlon